

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064

TELEPHONE (212) 373-3000

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUA ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

SUITES 3601 - 3606 & 3610
36/F, GLOUCESTER TOWER
THE LANDMARK
15 QUEEN'S ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

WRITER'S DIRECT DIAL NUMBER

(212) 373-3096

WRITER'S DIRECT FACSIMILE

(212) 492-0096

WRITER'S DIRECT E-MAIL ADDRESS

lvellazquez@paulweiss.com

535 MISSION STREET, 24TH FLOOR
SAN FRANCISCO, CA 94105
TELEPHONE (628) 432-5100

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

MATTHEW W. ABBOTT
EDWARD T. ACKERMAN
JACOB A. ADLERSTEIN
JUSTIN ANDERSON
ALLAN J. ARFFA
JONATHAN H. ASHTOR
ROBERT A. ATKINS
SCOTT A. BARSHAY
PAUL M. BASTA
J. STEVEN BAUGHMAN
LYNN B. BAYARD
CRAIG A. BENSON
JOSEPH J. BIAL
BRUCE BIRENBOIM
H. CHRISTOPHER BOEHNING
BRIAN BOLIN
ANGELO BONVINO
ANDRE G. BOUCHARD*
GERALD BRANT
ROBERT A. BRITTON
DAVID W. BROWN
WALTER F. BROWN*
SUSANNA M. BUEGEL
JESSICA S. CAREY
DAVID CARMONA
GEOFFREY R. CHEPIGA
ELLEN N. CHING
WILLIAM C. CLAREMAN
LEWIS R. CLAYTON
YAHONNES CLEARY
JAY COHEN
KELLEY A. CORNISH
CHRISTOPHER J. CUMMINGS
THOMAS V. DE LA BASTIDE III
MEREDITH R. DEARBORN*
ARIEL J. DECKELBAUM
KAREN L. DUNN
ALICE BELISLE EATON
ANDREW J. EHRICH
GREGORY A. EZRING
ROSS A. FIELDSTON
ANDREW C. FINCH
BRAD J. FINKELSTEIN
BRIAN P. FINNEGAN
ROBERTO FINZI
PETER E. FISCH
HARRIS FISCHMAN
ANDREW J. FOLEY
VICTORIA S. FORRESTER
HARRIS B. FREIDUS
CHRISTOPHER D. FREY
MANUEL S. FREY
ANDREW L. GAINES
KENNETH A. GALLO
MICHAEL E. GERTZMAN
ADAM M. GIVERTZ
SALVATORE GOGLIORMELLA
NEIL GOLDMAN
MATTHEW B. GOLDSTEIN
BRETTE TANNENBAUM
ROBERTO J. GONZALEZ*
CATHERINE L. GOODALL
CHARLES H. GOOGE, JR.
ANDREW G. GORDON
BRIAN S. GRIEVE
UDI GROFMAN
NICHOLAS P. GROOMBRIDGE
BRUCE A. GUTENPLAN
MELINDA HAAG*
ALAN S. HALPERIN
CLAUDIA HAMMERMAN
BRIAN S. HERMANN
JOSHUA HILL JR.
MICHELE HIRSHMAN
JARRETT R. HOFFMAN
ROBERT HOLO
DAVID S. HUNTINGTON
AMRAN HUSSEIN
LORETTA A. IPPOLITO
WILLIAM A. ISAACSON*
JAREN JANGHORBANI
BRIAN M. JANSON
JEH C. JOHNSON
BRAD S. KARP
PATRICK N. KARSNITZ
JOHN C. KENNEDY
BRIAN KIM
KYLE J. KIMPLER
JEFFREY L. KOCHIAN

ALEXIA D. KORNBERG
ALAN W. KORNBERG
DANIEL J. KRAMER
BRIAN KRAUSE
CAITH KUSHNER
DAVID K. LAKHDHIR
GREGORY F. LAUFER
BRIAN C. LAVIN
XIAOYU GREG LIU
RANDY LUSKEY*
LORETTA E. LYNCH
JEFFREY D. MARRELL
MARCO V. MASOTTI
DAVID W. MAYO
ELIZABETH R. MCCOLM
JEAN M. MCLOUGHLIN
ALVARO MEMBRILLERA
MARK F. MENDELSON
CLAUDINE MEREDITH-GOUJON
WILLIAM B. MICHAEL
JUDIE NG SHORTELL*
CATHERINE NYARADY
JANE B. O'BRIEN
BRAD R. OKUN
LINDSAY B. PARKS
ANDREW M. PARLEN
DANIELLE C. PENHALL
CHARLES J. PESANT
JESSICA E. PHILLIPS*
AUSTIN S. POLLET*
VALERIE E. RADWANER
JEFFREY J. RECHER
CARL L. REISNER
LORIN L. REISNER
JEANNIE S. REE*
WALTER R. RICCARDI
RICHARD A. ROSEN
ANDREW N. ROSENBERG
JUSTIN ROSENBERG
JACQUELINE F. RUBIN
CHARLES F. "RICK" RULE*
RAPHAEL M. RUSSO
ELIZABETH M. SACKSTEDER
JEFFREY D. SAFERSTEIN
JEFFREY B. SAMUELS
KENNETH M. SCHNEIDER
ROBERT B. SCHUMER
JOHN M. SCOTT
BRIAN SCRIVANI
KYLE T. SEIFRIED
KANNON K. SHANMUGAM*
CULLEN L. SINCLAIR
AUDRA J. SOLOWAY
SCOTT M. SONTAG
SARAH STASNY
TARUN M. STEWART
ERIC ALAN STONE
AIDAN SYNNOTT
BRETTE TANNENBAUM
RICHARD C. TARLOWE
DAVID TARR
MONICA K. THURMOND
DANIEL J. TOAL
LAURA C. TURANO
CONRAD VAN LOGGERENBERG
KRISHNA VEERARAGHAVAN
JEREMY M. VEIT
LIZA M. VELAZQUEZ
MICHAEL VOGEL
RAMY J. WAHBEH
JOHN WEBER
LAWRENCE G. WEE
THEODORE V. WELLS, JR.
LINDSEY L. WIERSMA
STEVEN J. WILLIAMS
LAWRENCE I. WITDORCHIC
AUSTIN WITT
MARK B. WLAZLO
ADAM WOLLSTEIN
JULIA TARVER MASON WOOD
JENNIFER H. WU
BETTY YAP*
JORDAN E. YARETT
KAYE N. YOSHINO
TONG YU
TRACEY A. ZACCONE
TAURIE M. ZITZER
T. ROBERT ZOCHOWSKI, JR.

*NOT ADMITTED TO THE NEW YORK BAR

December 10, 2021

By ECF

Hon. Taryn A. Merkl
United States District Court
Eastern District of New York
225 Cadman Plaza East, Courtroom 234 North
Brooklyn, New York 11201

Does et al v. Hochul et al, No. 1:21-cv-05067-AMD-TAM (E.D.N.Y.)

Dear Judge Merkl:

Defendants NewYork-Presbyterian Healthcare System, Inc. ("NYP") and Trinity Health, Inc. ("Trinity") jointly submit this letter, in advance of the December 14, 2021 telephonic conference on Plaintiffs' Motion to Proceed Using Pseudonyms, to bring to the Court's attention a recent decision by the Honorable Naomi Reice Buchwald of the U.S. District Court for the Southern District of New York denying a plaintiff's motion to proceed under a pseudonym in another case challenging the implementation of a COVID-19 vaccine mandate.

In *Doe v. City Univ. of New York et al*, No. 1:21-cv-09544 (S.D.N.Y.) (“*City University*”), plaintiff John Doe, a student at John Jay College of Criminal Justice (“JJC”), brought an action against the City University of New York (“CUNY”) and CUNY administrators asserting violations of his Constitutional rights and New York State law arising out of JJC’s implementation of CUNY’s COVID-19 vaccination policy, arguing that the policy discriminates against his Christian beliefs. *City University* at 1. In a December 1, 2021 Memorandum and Order, attached hereto as Exhibit A, Judge Buchwald denied the plaintiff’s motion to proceed under the pseudonym John Doe, holding that he failed to make a showing that justifies anonymity under the factors established by the Second Circuit in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 188–89 (2d Cir. 2008).

Specifically, addressing the first *Sealed Plaintiff* factor, Judge Buchwald stated that “[t]he fact that a case involves a medical issue is not a sufficient reason for allowing the use of a fictitious name.” *City University* at 5 (quoting *Doe v. New York State Dep’t of Health*, No. 20 Civ. 04817, 2020 WL 5578308, at *3 (S.D.N.Y. Sept. 17, 2020)). The court found—as is the case here—that “there is no independent medical issue separate and apart from plaintiff’s refusal to receive a COVID-19 vaccine on religious grounds.” *Id.* at 6. Judge Buchwald noted that, under such circumstances, “relying on a medical issue as a basis for anonymity does not withstand analysis.” *Id.*

Judge Buchwald went on to find that the second and third *Sealed Plaintiff* factors, relating to the risk and severity of harm from disclosure, “cut strongly against” the plaintiff, *id.* at 8, in the absence of a “particularized showing of harm.” *Id.* at 9 n.2. In that case, plaintiff had failed to establish “with sufficient specificity the incremental injury that would result from disclosure of his identity” “to justify the exceptional relief of proceeding anonymously.” *Id.* at 8 (quoting *Doe v. Freydin*, No. 21 Civ. 8371, 2021 WL 4991731, at *2 (S.D.N.Y. Oct. 27, 2021)). Judge Buchwald noted that “statements expressing a lack of patience or frustration at unvaccinated people do not support plaintiff’s claim that *he* would be subject to ‘extensive harassment and perhaps even violent reprisals,’ and do not suffice to justify anonymity,” *id.* at 9 (quoting *Doe v. Skyline Automobiles Inc.*, 375 F. Supp. 3d 401, 406 (S.D.N.Y. 2019)) (emphasis added), and that plaintiff in that case—like each of the plaintiffs here—“presents no evidence of the specific harm that he would be subject to if his name were disclosed.” *Id.* at 10.

With respect to the fifth *Sealed Plaintiff* factor, Judge Buchwald noted the fact that the case involves “a suit against a government entity . . . is not dispositive.” *Id.* at 12 (quoting *Doe v. City of New York*, No. 19 Civ. 9338, 2021 WL 964818, at *2 (S.D.N.Y. Mar. 15, 2021)). Given that—as is the case here—the plaintiff was also suing private defendants, this factor did not “weigh in favor of allowing plaintiff to proceed anonymously.” *Id.* at 13. The court also found that the sixth *Sealed Plaintiff* factor, which evaluates the prejudice to defendants absent disclosure, “cuts against plaintiff,” for reasons consistent with those raised by defendants here. *Id.* Notably, the court found harm to defendants despite plaintiff’s proposal to disclose his identity to *defendants* under

the terms of a protective order because “concealment of plaintiff’s identity from the public can still hamper defendants’ ability to conduct discovery.” *Id.* (citing *Rapp v. Fowler*, No. 20 Civ. 9586, 2021 WL 1738349, at *7 (S.D.N.Y. May 3, 2021)).

As for the seventh factor, “which asks whether plaintiff’s identity has remained confidential,” *id.* at 13, the court noted that, “[a]s a general matter, vaccination status is not inherently confidential: mandatory vaccination and the disclosure thereof is well established.” *Id.* at 14 (citations omitted). And, as defendants have argued here, Judge Buchwald agreed that the eighth factor, “whether the public’s interest in the litigation is furthered by requiring the plaintiff to disclose his identity” “cuts against plaintiff.” *Id.* at 15. With respect to the ninth *Sealed Plaintiff* factor, the court rejected plaintiff’s argument that the issues in that case are primarily legal in nature, thereby weakening the public’s interest in disclosure. *Id.* at 15–16. The court found that the complaint there “put factual questions about [plaintiff’s] actions at issue” by raising “not just the legal issue of whether the Student COVID-19 Vaccination Policy . . . is facially Constitutional, but also whether the refusal to provide a religious exception to plaintiff specifically is Constitutional.” *Id.* at 16. So too, here, where plaintiffs have brought Title VII and other claims against the private employer defendants, based on facts specific to their employment.

Finally, concerning the tenth *Sealed Plaintiff* factor, Judge Buchwald noted that there are alternative methods to protect the confidentiality of the plaintiff’s information, including redaction of documents, sealing, and a protective order, thereby disfavoring anonymity. *See id.*

In conclusion, the court held that “plaintiff has not met his burden of demonstrating that his ‘interest in anonymity’ outweighs the prejudice to defendants and ‘the customary and constitutionally-embedded presumption of openness in judicial proceedings.’” *Id.* at 17 (quoting *Sealed Plaintiff*, 537 F.3d at 189). The same conclusion is warranted here.

* * *

Defendants NYP and Trinity will be prepared to discuss these matters at the conference on December 14 and to answer any questions the Court may have.

Dated: December 10, 2021
New York, New York

Respectfully submitted,

By: /s/ Liza M. Velazquez

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

Bruce Birenboim

Michael E. Gertzman

Liza M. Velazquez

Gregory F. Laufer

Jonathan Hurwitz

Emily A. Vance

1285 Avenue of the Americas

New York, NY 10019-6064

Phone: (212) 373-3000

Fax: (212) 757-3990

bbirenboim@paulweiss.com

mgertzman@paulweiss.com

lvelazquez@paulweiss.com

glaufer@paulweiss.com

jhurwitz@paulweiss.com

evance@paulweiss.com

*Attorneys for New York-Presbyterian
Healthcare System, Inc.*

/s/ Jacqueline Phipps Polito

Jacqueline Phipps Polito, Esq.

Erin M. Train, Esq.

LITTLER MENDELSON, P.C.

375 Woodcliff Drive, Suite 2D

Fairport, NY 14450

jpolito@littler.com

etrain@littler.com

Tel. 585.203.3400

Attorneys for Defendant
TRINITY HEALTH, INC.

cc: All counsel by ECF